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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	8
I. THE JUDGMENT SHOULD BE SUMMARILY AFFIRMED BECAUSE THE DISTRICT COURT CORRECTLY CONCLUDED THAT SECTION 4 IS A CONTENT-NEUTRAL LAW THAT IS NARROWLY TAILORED TO PROMOTE SUBSTANTIAL GOVERNMENTAL INTERESTS	8
A. Section 4 Is Content-Neutral and Thus Is Subject, At Most, To The *O'Brien/Ward* Test	8
B. It Is Uncontested That Section 4 Satisfies the *O'Brien/Ward* Test	12
C. Appellants' Unprecedented Arguments for "Per Se" Application of Strict Scrutiny Are Unfounded	15
1. Appellants' "Compelled Speech" and "Editorial Discretion" Arguments For Strict Scrutiny Are Unfounded	16
2. Appellants' "Favoritism" and "Discrimination" Arguments for Strict Scrutiny Are Unfounded	20
D. The District Court Could Properly Have Upheld Section 4 Under The Rational Basis Test	23
II. THE JUDGMENT SHOULD BE SUMMARILY AFFIRMED FOR THE INDEPENDENT REASON THAT FACILITATING COMPETITION THROUGH THE MONOPOLIZED CABLE CONDUIT DOES NOT REQUIRE THE SAME FIRST AMENDMENT SCRUTINY AS REGULATION OF THE EDITORIAL DISCRETION OF THE TRADITIONAL PRESS	24
CONCLUSION	30

TABLE OF AUTHORITIES

Cases	Page
Associated Press v. United States, 326 U.S. 1 (1945)	23, 29
Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)	19
Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991)	14
Branzburg v. Hayes, 408 U.S. 665 (1972)	16
Buckley v. Valeo, 424 U.S. 1 (1976)	21
Burson v. Freeman, 112 S. Ct. 1846 (1992)	20
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)	6, 12, 25
Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), *clarified by*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988)	5
Chesapeake and Potomac Telephone Co. v. United States, No. 92-CV-1751-A (E.D. Va. 1993)	7, 22
City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505 (1993)	8, 10
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986)	24, 28, 29
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	*passim*
Columbia Broadcasting Systems, Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973)	14
FCC v. Beach Communications, Inc., 113 S. Ct. 2096 (1993)	20, 23
FCC v. Midwest Video Corp., 440 U.S. 689 (1979)	29
FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978)	14, 30
FTC v. Superior Ct. Trial Lawyers' Ass'n, 493 U.S. 411 (1990)	12
Febus v. Barot, 260 N.J. Super. 322, 616 A.2d 933 (3d Dist. 1992)	16
First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978)	19
Kovacs v. Cooper, 336 U.S. 77 (1949)	24
Landmark Communs., Inc. v. Virginia, 435 U.S. 829 (1978)	15
Leathers v. Medlock, 111 S. Ct. 1438 (1991)	5, 20, 23

TABLE OF AUTHORITIES—Continued

	Page
Marchione v. New York, 598 N.Y.S.2d 592 (3d Dep't 1993)	16
Mathis v. Morrissey, 11 Cal. App. 4th 332, 13 Cal. Rptr. 2d 819 (1992)	16
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)	13, 14
Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981)	24
Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974)	*passim*
Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983)	22
Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1 (1986)	19, 21
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)	*passim*
Quincy Cable Television, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986)	5
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	24, 27
Regan v. Taxation With Representation, 461 U.S. 540 (1983)	22
Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988)	17
Rostker v. Goldberg, 453 U.S. 57 (1981)	14
Sable Communs. of Cal., Inc. v. FCC, 492 U.S. 115 (1989)	15
San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987)	19
Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501 (1991)	8
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	24
Sunbelt Television, Inc. v. Jones Intercable, Inc., 795 F. Supp. 333 (C.D. Cal. 1992)	23
United States v. Albertini, 472 U.S. 675 (1985)	12
United States v. Eichman, 496 U.S. 310 (1980)	21, 22
United States v. O'Brien, 391 U.S. 367 (1968)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
United States v. Southwestern Cable Co., 392 U.S. 157 (1968)	6
Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985)	14
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	*passim*
Wooley v. Maynard, 430 U.S. 705 (1977)	11, 19
Administrative Rulings	
Cable Television Report and Order, 36 F.C.C.2d 325 (1972), *aff'd sub. nom. American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975)	28
Cable Television Syndicated Program Exclusivity Rules Report and Order, 79 F.C.C.2d 663 (1980), *aff'd sub. nom. Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982)	28
First Report and Order, 38 F.C.C. 683 (1965)	27
Second Report and Order, 2 F.C.C.2d 725 (1966)	28
Statutes and Regulations	
2 U.S.C. §§ 261-270	16
17 U.S.C. § 111	27
26 U.S.C. §§ 6012	16
26 U.S.C. § 6061	16
31 U.S.C. § 5311	16
38 U.S.C. § 7332	16
39 U.S.C. § 3685	16
42 U.S.C. § 242	16
47 U.S.C. § 11	16
47 U.S.C. § 151	4
47 U.S.C. § 201	16
47 U.S.C. § 224(b)(1)	26
47 U.S.C. § 521	*passim*
47 U.S.C. § 531	*passim*
47 U.S.C. § 532	7
47 U.S.C. § 533	9, 27
47 U.S.C. § 534	*passim*

TABLE OF AUTHORITIES—Continued

	Page
47 U.S.C. § 535	1
47 U.S.C. § 536	2
47 U.S.C. § 541(a)(2)	27
47 U.S.C. § 542(b)	27
47 U.S.C. § 544(b)	27
26 C.F.R. § 31.6001	16
47 C.F.R. § 63.54(a) (1970)	27
47 C.F.R. § 76.501(a) (1970)	27
Miscellaneous	
Brief For Appellant in No. 79-289, *PruneYard Shopping Center v. Robins*	17
William J. Brennan, Jr., *Address*, 32 Rutgers L. Rev. 173 (1979)	19
Daniel Brenner, Cable Television and the Freedom of Expression, 1988 Duke L.J. 329 (1988)	25
Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommuns. Act Before the Subcomm. on Communs. of the Senate Comm. on Commerce, 101st Cong., 1st Sess. 548 (1990)	13
S. Rep. No. 92, 102d Cong., 1st Sess.	*passim*
Potter Stewart, *"Or of the Press"*, 26 Hastings L. Rev. 631 (1975)	19
Television and Cable Action Update, Feb. 8, 1993	25

Appellee National Association of Broadcasters ("NAB"), representing commercial broadcast stations nationwide, respectfully moves to affirm the judgment of a three-judge district court rejecting a First Amendment challenge to Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 531 *et seq.* (the "Act"), which requires cable operators to carry the signals of a limited number of local commercial television stations.[1] Plenary review is unwarranted because the district court correctly applied settled principles in upholding Section 4.

STATEMENT OF THE CASE

1. *The Act.* Congress found that cable operators exercise bottleneck monopoly control over access to the local video marketplace, and that carriage on cable systems is essential to the survival of free local broadcast television. Section 4, one of the so-called "must carry" provisions of the Act, addresses this problem by requiring cable operators to carry a limited number of local commercial television signals they would otherwise have substantial anticompetitive incentives to silence.[2]

By its terms and operation, Section 4 is content-neutral and viewpoint-neutral.[3] It does not prohibit cable operators from disseminating programming on any subject or from expressing any point of view. Must carry obligations are *not* triggered by the programming content of a cable system, and thus do not deter or penalize particular programming choices. Must carry rights are *not* dependent

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[1] NAB was granted leave to intervene as a defendant below. Appendix to the Jurisdictional Statement (hereafter "J.S. App."), at 3a.

[2] Section 4 is codified at 47 U.S.C. § 534. The other "must carry" provision—Section 5, 47 U.S.C. § 535—requires cable operators to carry the signals of certain *noncommercial* educational television stations. NAB does not address that provision.

[3] Congress stressed that "[t]he application of must carry rules . . . has nothing to do with the content of any speech and . . . is not intended to suppress any ideas." S. Rep. No. 92, 102d Cong., 1st Sess. 57 (1990) ("Senate Report").

on the programming content of local broadcasters, who may qualify for carriage pursuant to Section 4 without regard to the content of their programming. The Act leaves cable operators entirely free to disseminate any programming they choose on the substantial majority of their channels, and leaves cable programmers entirely free to compete for carriage on all of those channels. Moreover, the Act does not restrict cable operators' freedom to expand their channel capacity to accommodate an unlimited number of video programmers of their choice. The applicability of Section 4 depends solely on the *technology* used by speakers and their geographic *location.* Speakers who use over-the-air broadcast technology, and who originate their signals locally, are eligible to elect must carry rights under Section 4 regardless of the program content of those signals.[4]

The Act's narrowly tailored remedial plan is the result of years of comprehensive congressional study of the cable industry. Based on an extensive record, Congress found and sought to remedy substantial threats to competition arising from cable's status as a bottleneck monopoly exercising control over access to consumers of video programming. Findings ¶¶ 3, 13, 17.[5] Cable now serves approximately 60% of all American households with

[4] *See* 47 U.S.C. § 534(h)(1). Section 4 does not require cable operators to carry all commercial television stations whose signals originate within their markets. After carrying a specified number of stations (never more than one-third of its active channels), the cable operator can refuse to carry additional local television stations. Furthermore, commercial television stations may elect not to exercise their rights under Section 4, choosing instead the right to negotiate with the cable system to be compensated for carriage (the right of "retransmission consent," established by Section 6 of the Act, 47 U.S.C. § 536). Section 4 imposes no obligations on cable operators to carry the signals of stations who elect to pursue retransmission consent, but every local signal the cable operator chooses to carry pursuant to the retransmission consent provision counts towards satisfying the operator's must carry obligation.

[5] Congress' findings appear in 47 U.S.C. § 521 Historical and Statutory Notes, and in J.S. App. at 82a-87a.

television sets (*id.* ¶ 3), and has effectively replaced broadcast television as the source of video programming for those households. *Id.* ¶ 17.[6] "The result," Congress found, "is undue market power for the cable operator as compared to that of consumers and video programmers." *Id.* ¶ 2.

This bottleneck chokehold gives cable operators both "the incentive and ability" to commit anticompetitive acts against broadcast competitors. *See id.* ¶ 5. Cable operators have the *ability* to act anticompetitively, because their refusal to carry local television stations prevents those stations from reaching 60% of their potential audience. *See id.* ¶¶ 14-16. Cable operators have a particular *incentive* to harm local television stations, because "[c]able television systems and broadcast television stations increasingly compete for television advertising revenues." *Id.* ¶ 14; *see id.* ¶¶ 15 and 16. Indeed, local broadcast stations are cable's *only* meaningful competitors for such advertising revenues.

[6] Congress expressly rejected the contention that broadcasters have alternative means to reach the 60% of American households now receiving cable service. The 1991 Report of the Senate Subcommittee on Communications noted "considerable evidence that once individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air-signal." Senate Report at 45. Although appellants now suggest that consumers might in some circumstances use what are known as "A/B switches" to access over-the-air signals, J.S. 26, n.16, appellant ICTA has expressly acknowledged that such switches "are unworkable and contrary to the public interest." Joint Petition For Reconsideration submitted to the FCC in MM Docket No. 85-349 on Dec. 17, 1986 by NCTA and others. Citing that Joint Petition and other evidence (*see* Senate Report at 45), Congress expressly found that the A/B switch "is not an enduring or feasible method of distribution and is not in the public interest." ¶ 18; *see Turner Broadcasting System, Inc. v. FCC*, J.S. App. 27a. Moreover, 98% of cable homes do not have a roof antenna, Senate Report at 45, n.16, and many jurisdictions *prohibit* them, eliminating in many cases viewers' ability to receive signals off air. As the Senate Report explained, "[e]vidence demonstrates that market factors, absent government regulation, are unable to cure cable's bottleneck problems." *Id.* at 51.

Congress determined that over-the-air broadcasting and, hence, effective competition in the market for video programming, were immediately and seriously threatened. *See id.* ¶¶ 14-16. Anticompetitive exclusion of broadcast stations from cable had occurred, and "[t]here is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried." *Id.* ¶ 15. These risks of anticompetitive harm are so substantial, Congress concluded, that, absent remedial legislation, "the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized." *Id.* ¶ 16. This threat to local broadcast television particularly placed at risk the interests of the 40% of the American public who do not have cable television, *id.* ¶¶ 3, 12, and thus are entirely dependent on free broadcast television for access to video programming.

Congress decided to ameliorate these risks in order to advance three distinct objectives—each of which independently justifies Section 4 without reference to the content of expression. *First*, Congress sought to preserve "the continued availability" of "free television programming" for the 40% of American households *without* cable, "especially for viewers who are unable to afford other means of receiving programming." *Id.* ¶ 12. *Second*, Congress sought to prevent anticompetitive conduct by cable operators in the market for video programming, *see id.* ¶¶ 4-5, which, if left unregulated, would harm consumer welfare by increasing advertising costs and diminishing programming quality. *Third*, Congress sought to ensure that the goals of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*— a fair, efficient and equitable distribution of diverse *broadcast* services—could be achieved in an era of increasing cable dominance. *See id.* ¶¶ 6, 9-11.

2. *The decision below.* The majority of the three-judge district court ruled that the must carry provisions are constitutional under the governing First Amendment principles established by this Court in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (rejecting a "compelled speech" claim indistinguishable from appellants' claim), *Leathers v. Medlock*, 111 S. Ct. 1438 (1991) (rejecting a "discrimination" claim indistinguishable from appellants' claim), *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (laws with predominate purposes "unrelated to the suppression of free expression" *not* subject to strict scrutiny), and *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (same).[7]

All three judges agreed that cable's bottleneck monopoly presents "a very real problem," J.S. App. 50a (Williams, J., dissenting), which Congress has the power to remedy by requiring cable operators to carry speakers they would otherwise exclude. The majority upheld the must carry provisions because they "are essentially economic regulations designed to create competitive balance in the video industry as a whole, and to redress the effects of cable operators' anti-competitive practices," J.S. App. 13a, explaining that "Congress employed its regulatory powers over the economy to impose order upon a market in dysfunction, but a market in a commercial commodity nevertheless; not a market in 'speech.'" J.S. App. 12a.

The court rejected the argument that the must carry provisions trigger strict scrutiny because they allegedly

[7] As the district court correctly held, the D.C. Circuit's decisions in *Quincy Cable Television, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986), and *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987), *clarified by*, 837 F.2d 517 (D.C. Cir.), *cert. denied*, 486 U.S. 1032 (1988), are distinguishable and are not to the contrary. J.S. App. 15a. In both cases, the regulations were found unconstitutional on the narrow ground that there was literally *nothing* in the record to support the FCC's determination that they were necessary to further the governmental interests asserted there, or that they were narrowly tailored to serve those interests. *See Century*, 835 F.2d at 300-04; *Quincy*, 768 F.2d at 1455-57, 1459, 1462-63. Congress' extensive findings of fact, supported by the record, plainly distinguish Section 4 from the FCC must carry regulations considered in *Quincy* and *Century*.

favor broadcasters over cable programmers, explaining that "[s]peaker partiality alone, . . . absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny." J.S. App. 18a. The court held that must carry does not trigger strict scrutiny because it is "unrelated to the content of [the] expression upon which it may have an effect." J.S. App. 19a, *citing Ward*, 491 U.S. at 791.

Because the court concluded that Section 4 was "*justified* by the existing structure of the cable business itself," without regard to content, it applied the test fashioned in *United States v. O'Brien*, 391 U.S. 367 (1968), and *Ward*, J.S. App. 13a, 22a (emphasis added), and found that Section 4 easily satisfied that test. Congress' interest—"to promote fair competition among video 'speakers' in order to assure the survival of local broadcasting for the benefit of both those who subscribe to a cable service and for those who do not"—is substantial. J.S. App. 23a-24a, *citing, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 & nn. 38 & 39 (1968), and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984). And Section 4 is "narrowly tailored" to further that interest. As the court noted, under *O'Brien*, "the government is not required to settle for means that serve its interests less effectively merely because an alternative might be less burdensome." J.S. App. 26a-27a, citing *Ward*, 491 U.S. at 799. The court then held that the provisions "do not unnecessarily burden a substantial amount of [appellants'] speech." J.S. App. 27a. Section 4 "leaves open adequate—in fact, plentiful—alternative, intramedium channels of communication for cable speakers to deliver whatever messages they choose." J.S. App. 28a.

Although Judge Williams also rejected the legal arguments that were central to appellants' claim below (and on this appeal), he dissented based on an argument appellants had not raised below, and do not raise here. He concluded that "consistent with the First Amendment"

Congress *can* address the "bottleneck" problem by *compelling* cable operators to grant "compulsory access" to speakers they would otherwise choose not to carry, but only if Congress mandates access for "*all* parties that meet neutral criteria for service." J.S. App. 50a-51a (emphasis added). *See* J.S. App. 59a, 60a-61a, 66a-67a, and 71a.[8] Thus, the crux of Judge Williams' concern was that cable *programmers* were not accorded access rights *identical* to those granted local broadcasters.[9]

Appellant filed an Application For An Injunction Pending Appeal, which Chief Justice Rehnquist denied.[10]

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[8] The remedy proposed by Judge Williams would have been far more intrusive than the remedy Congress chose. According to Judge Williams, Congress could "expand the fraction of channels available" for "compulsory access" pursuant to the "leased access" provision of 47 U.S.C. § 532 to the extent necessary to "get broadcast TV into the homes of cable viewers," J.S. App. at 51a, 66a; could "set maximum reasonable rates and other reasonable terms and conditions" for such leased access, J.S. App. at 60a; and, if "broadcasters" could not afford leased access even under those regulated rates, "could subsidize the difference to the extent necessary." J.S. App. at 66a. Under the dissenter's proposal, in order to protect local broadcasters to the extent Congress found necessary while extending identical protection to all cable programmers, Congress would have had to impose common-carrier like obligations over a greater number of channels than are affected by the Act.

[9] Judge Williams failed to consider (or even note) that the Act gives cable programmers very substantial rights and protections against anticompetitive or unfair practices by cable operators, all of which are designed to ensure that cable programmers will have meaningful access to viewers. *See* Act, §§ 9(b), 11(c), and 12, and 19. Congress simply tailored the rights it gave broadcast stations and cable programmers to their differing needs. Even if the Act *were* underinclusive in the sense that it failed to protect cable programmers from operators' predatory conduct, no case has held that such underinclusiveness can invalidate otherwise constitutional legislation. Moreover, the *overall* statutory program is *not* underinclusive; Congress has tailored significant statutory protections to the particular competitive needs of cable programmers.

[10] *Turner Broadcasting Sys., Inc. v. FCC*, 113 S. Ct. 1806 (1993) (Rehnquist, C.J., in chambers).

ARGUMENT

I. THE JUDGMENT SHOULD BE SUMMARILY AFFIRMED BECAUSE THE DISTRICT COURT CORRECTLY CONCLUDED THAT SECTION 4 IS A CONTENT-NEUTRAL LAW THAT IS NARROWLY TAILORED TO PROMOTE SUBSTANTIAL GOVERNMENTAL INTERESTS.

Applying traditional First Amendment principles, the district court properly reviewed Section 4 under the *O'Brien/Ward* test rather than under strict scrutiny, and correctly ruled that Section 4 satisfied that test because it is a content-neutral law that is narrowly tailored to promote substantial governmental interests. J.S. App. 22a-28a.[11] Appellants' challenge to that decision depends on exotic and plainly incorrect legal arguments, and on rejection of Congress' well-supported factual findings. Those arguments are foreclosed by settled law and do not require plenary consideration.

A. Section 4 Is Content-Neutral and Thus Is Subject, At Most, To The *O'Brien/Ward* Test.

In ascertaining what level of scrutiny applies to legislation affecting First Amendment activity, "[t]he government's *purpose* is the *controlling* consideration." *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies *only* to "regulations enacted for *the purpose of restraining speech on the basis of its content.*" *Renton*, 475 U.S. at 46-47 (emphasis added).[12] The less demanding scrutiny of *O'Brien* and its progeny applies where the purpose of the legislation is "unrelated to the suppression of free expression," *O'Brien*, 391 U.S. at 377, or where the legislation is "*justified* without reference to the content of the regulated speech," *Renton*, 475 U.S. at 48 (quotation omitted); *Ward*, 491 U.S. at 791.[13]

The district court correctly held that Section 4 is justified without reference to the content of any speech, and that its purposes are unrelated to the suppression of expression. J.S. App. 16a. Appellants have conceded that Section 4 is not *viewpoint*-based. J.S. App. 15a. Its application is triggered without regard to the *content* of cable operators', cable programmers', or broadcasters' speech. J.S. App. 16a. Section 4 simply requires cable operators to carry a specified number of signals

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[11] In any event, cable's special characteristics would justify a relaxed standard of review for regulations governing access to the cable conduit. *See* Point II, *infra*.

[12] *Simon & Schuster, Inc. v. New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), and *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), are not to the contrary. In *Simon & Schuster*, the Court held that the statute failed the *O'Brien/Ward* test, and therefore determined that it "need not address" whether strict scrutiny applied. 112 S. Ct. at 511 n.**. In *Discovery Network*, the Court applied strict scrutiny because it concluded that the purpose of the ordinance at issue *was* related to the suppression of expression, because the ordinance was premised on the City's conclusion that the speech suppressed was of "low value." 113 S. Ct. at 1506. As the Court explained, "[i]t is the absence of a neutral *justification* . . . that prevents the city from defending its newsrack policy as content-neutral." *Id.* at 1517 (emphasis added).

[13] Notably, on July 9, 1993, appellant National Cable Television Association, Inc. ("NCTA"), submitted a brief to the United States District Court for the Eastern District of Virginia in which NCTA candidly acknowledged and even urged this very point in support of provisions of the Cable Communications Policy Act of 1984 that prohibit telephone companies from providing video programming to subscribers within their service areas, 47 U.S.C. § 533(b). Supplemental Memorandum of Intervenor-Defendant National Cable Television Association, Inc. in *Chesapeake and Potomac Telephone Co. v. United States*, No. 92-CV-1751-A (E.D. Va. 1993) at 17, quoting *Ward*, 491 U.S. at 791 (hereafter, "NCTA Supp. Mem."). Copies of that brief have been lodged with the Clerk of this Court. The district court agreed, holding that the statutory provisions at issue were subject to *O'Brien* because the government had advanced justifications unrelated to the suppression of expression and without reference to the content of the regulated speech. 1993 U.S. Dist. LEXIS 11822, slip op. at 35-40 (Aug. 24, 1993). Nevertheless, the court held—in a portion of its opinion with which we disagree—that the restrictions were unconstitutional because the ban did not "fit with its asserted justification" and "burden[ed] substantially more speech than is necessary to further the government's legitimate interests." Slip op. at 50, 55. The "fit" in this case is much closer. *See* Point I.B., *infra*.

that are transmitted in a certain manner—*i.e.* over the air, via the broadcast spectrum—*regardless* of their content.

Congress' principal goals were protecting free local broadcasting from unfair competitive practices by cable operators, and safeguarding the interests of the substantial number of Americans who are entirely dependent on free broadcast television. These goals are "unrelated to the suppression of free expression." The public will retain the benefits of effective competition, *regardless* of the content of local broadcasting, so long as cable operators are prevented from destroying "the economic viability of free local broadcast television." *Findings,* ¶ 16, J.S. App. 86a. And the 40% of Americans without cable television benefit by having continued access to free video programming, without regard to the specific content of the broadcast signals. These content-neutral justifications require application of the *O'Brien/Ward* test.[14]

Section 4 cannot be considered "content-based" as a result of Congress' *additional* finding that broadcast television stations are "an important source" of local programming, *Findings,* ¶ 11, J.S. App. 85a, and that absent must carry the ability of broadcast stations "to originate quality local programming will be seriously jeopardized." *Findings,* ¶ 16, J.S. App. 86a. These findings simply recognize that free broadcast television furthers the purposes of the Communications Act by contributing to the diversity of information sources available to the American people, who would be injured if free broadcast television were not protected from anti-competitive acts. They do *not* represent a judgment that the content of broadcast programming is (in the dissenting judge's words) "*especially* worthy," J.S. App. 53a (emphasis added);

[14] Section 4 is also content-neutral in the "commonsense" usage referred to in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. at 1516-17, because its obligations are triggered by non-content factors—*technology* and *location*—and require carriage of speech without regard to its content.

that any *other* programming is "worse"; or that any programming whatsoever should be suppressed. Nothing in the Act or its extensive legislative history suggests Congress held such views or had such a goal.[15]

Such limited consideration of the *impact* of the cable bottleneck is an inevitable consequence of the bottleneck itself and the dangers it poses to the marketplace of ideas. Before partially displacing private control of that bottleneck, Congress appropriately considered whether, absent regulation, the video marketplace was at risk of losing any viewpoint-neutral categories or sources of information. Such consideration enabled Congress to tailor its access remedy to the actual dangers posed by the cable bottleneck, and to avoid needless interference with cable operators' private control over the mix of programming.[16] Congress' observations about the cable bottleneck's threat to local programming are viewpoint-neutral and not in any sense suppressive. Accordingly, those observations are unrelated to the suppression of free expression.

Moreover, even a legislative purpose to *suppress* speech of particular content—which is wholly lacking here—cannot subject a provision to strict scrutiny if that provision's "predominate" purposes are unrelated to the suppression of speech. *E.g., Renton,* 475 U.S. at 47-49; *O'Brien,* 391 U.S. at 382-86; *Wooley v. Maynard,* 430 U.S. 705, 716 (1977) (applying *O'Brien* test to a law that compelled speech of particular content even though one of the state's interests was "not ideologically neutral," because *another* interest was unrelated to the

[15] Indeed, the extensive protection Congress provided—in the 1984 *and* 1992 Cable Acts—to *cable* programmers demonstrates conclusively that Congress did not seek to suppress cable programming. *See* n.9, *supra.*

[16] For example, Section 4 expressly relieves cable operators of the obligation to carry local broadcasters who provide programming that substantially duplicates other programming carried on the system. Such viewpoint-neutral, non-suppressive consideration of "content" *reduces* the burden Section 4 imposes on cable operators, while ensuring that Section 4 furthers its important purposes.

suppression of expression). Thus, even if promotion of "localism"—the only allegedly content-based purpose on which appellants rely—could be said to be related to the "suppression" of any expression (and it cannot), that goal was plainly not Congress' primary goal, and therefore does not trigger strict scrutiny.[17] For these reasons, the district court correctly applied the test set forth in *O'Brien* and *Ward*.

B. It is Uncontested That Section 4 Satisfies the *O'Brien/Ward* Test.

Under *O'Brien*, a law is constitutional if 1) it "furthers an important or substantial governmental interest"; 2) "the governmental interest is unrelated to the suppression of free expression," 391 U.S. at 377; and 3) the "government interest . . . would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (construing the *O'Brien* test); *United States v. Albertini*, 472 U.S. 675, 689 (1985) (same).

The jurisdictional statement does not even cite *O'Brien*, and does not argue that Section 4 fails scrutiny under the *O'Brien Ward* test. No such argument could be made. In *Capital Cities Cable, Inc. v. Crisp*, the Court held that regulations aimed at "protecting noncable households from loss of regular television broadcasting service due to competition from cable systems" "reflect[ed] an important and substantial federal interest." 467 U.S. at 714. The other interests asserted by Congress—preventing anticompetitive conduct in a critically important industry and promoting diversity of expression—have also been found substantial and important. *FTC v. Superior Ct. Trial Lawyers' Ass'n*, 493 U.S. 411, 430 (1990) (preventing

[17] As the district court ruled, "the record indicates that Congress' *primary* purpose in enacting must-carry was to restore competitive balance and assure a functional market in the distribution of video signals, whatever might be said with those signals." J.S. App. 19a (emphasis added). Even the dissent acknowledged that the decision to impose must carry obligations rested only "in part" on the goal of promoting localism. J.S. App. 51a.

anti-competitive conduct); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567-68 (1990) (promoting diversity of expression). *O'Brien/Ward*'s second prong is met as well because those interests are "unrelated to the suppression of free expression." *See* Point I.A. *supra*.

Section 4 easily satisfies *O'Brien/Ward*'s third prong because the "fit" between the statute's ends and means is far closer than required by that test.[18] Restricting cable operators' ability to inflict anticompetitive injury on local broadcasting by requiring them to carry a limited number of local broadcast signals indisputably furthers the congressional goals. Indeed, appellant NCTA itself urged Congress to "enact a 'must carry' law," agreeing that "it is in our national interest to maintain a strong viable system that has the free over-the-air system."[19] NCTA also told Congress that must carry provisions were needed "to assure continued carriage on cable systems of qualified local broadcast stations."[20] Congress carefully crafted Section 4 to achieve its structural objectives, striking an appropriate balance between competing interests. Cable operators are not required to carry *all* local television stations, are free to select any programming whatsoever on the majority of their channels, and are free to add to their systems as many channels as they wish.[21] Section 4

[18] Indeed, Section 4 would satisfy even strict scrutiny, but the court need not reach that question in order to affirm.

[19] Hearings before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 101st Cong., 2d Sess., on S. 1880, March 29 and April 4, 1990, at 306 (testimony of Decker Anstrom).

[20] Letter from Mr. James P. Mooney of NCTA to the Hon. Daniel K. Inouye, Jan. 17, 1990, *reprinted in Oversight of Cable TV: Hearings on the Oversight of the 1984 Cable Telecommuns. Act Before the Subcomm. on Communs. of the Senate Comm. on Commerce*, 101st Cong., 1st Sess. 548 (1990).

[21] Section 4 is even more precisely tailored given the interaction of the retransmission consent provision. *See* note 4, *supra*. Broadcasters who are likely to be carried in the absence of must carry will demand retransmission consent—thereby foregoing their must carry rights—in order to receive compensation. Section 4 will thus

plainly "promotes . . . substantial government interest[s] that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 798-99. *See also Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2463 (1991) (plurality opn.).

In cases reviewed under the *O'Brien/Ward* test, courts must be particularly respectful of Congress' findings and remedial choices.[22] Deference is due if Congress "could reasonably have determined that its interests overall would be served less effectively without the [law] than with it." *Ward*, 491 U.S. at 801; *Renton*, 475 U.S. at 50-52 (same).[23]

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function to protect those broadcasters who are most at risk of being excluded from cable systems, and for whom non-carriage will have the most devastating consequences. The Act thus protects *precisely* those broadcast stations most in need of protection.

[22] Appellant NCTA recently argued in the Eastern District of Virginia: "As cases like *Ward*, *Clark*, *Albertini*, and most recently *Edge Broadcasting*, make clear, deference to the means selected by the legislature is inherent in—indeed the defining characteristic of—the *O'Brien/Ward* standard of review." NCTA Supp. Mem., *supra* n.13, at 14-15.

[23] *See also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (courts "must pay close attention to . . . the factfinding of Congress," and with respect to "'complex' empirical question[s]," are "required to 'give great weight to the decisions of Congress'") (quoting *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973)); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) ("When Congress makes findings on essentially factual issues . . . those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on [the] issue[s]"); *Columbia Broadcasting*, 412 U.S. at 102-03 ("The judgment of the Legislative Branch cannot be ignored or undervalued" simply because one side of the debate "casts its claims under the umbrella of the First Amendment."); *Rostker v. Goldberg*, 453 U.S. 57, 64, 67-68, 72-73 (1981); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 813 (1978) (deference particularly appropriate for agency fact findings "of a judgmental or predictive nature"). Accordingly, deference is warranted for Congress' findings of fact, including its predictive judgments regarding the viability of local broadcasting in the absence of must-carry obligations.

The cases appellants cite—*Sable Communs. of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989), and *Landmark Communs., Inc. v. Virginia*, 435 U.S. 829, 843 (1978)—arise in the inapposite context of strict scrutiny, and even in that context hold only that courts will not defer to Congress' *legal* conclusions. Those cases are thus irrelevant to this case, which involves Congress' empirical findings and predictive judgments. *Sable* held, in addition, that in the context of strict scrutiny the Court need not defer to governmental "assertions" of fact made for the first time in legal proceedings, when there were "*no* legislative findings" of fact and "*no* evidence in the record" to support those assertions. 492 U.S. at 128-29 (emphasis added). Here, by contrast, there are extensive legislative findings of fact and overwhelming evidence in the record before Congress to support them. Deference to the *facts* Congress found is therefore required.[24] It is undisputed, and indisputable, that those facts easily satisfy the *O'Brien/Ward* test.

C. Appellants' Unprecedented Arguments for "Per Se" Application of Strict Scrutiny Are Unfounded.

Appellants' challenge rests on two unprecedented and unpersuasive arguments for *per se* application of strict scrutiny.

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[24] The dissent below erroneously believed that critical assertions of fact made by appellants in their belated effort to dispute Congress' findings were "uncontradicted." J.S. App. 55a n.3, 62a, 64a, 65a, 66a. To the contrary, NAB and the federal defendants specifically contested those assertions of fact, on procedural grounds and on the merits, and sought the opportunity to engage in discovery regarding them as authorized by F.R. Civ. Pro. 56(f). Intervenor-Defendant Applicant National Association of Broadcasters' Response to Plaintiffs' Statement of Material Facts (filed February 19, 1993). Appellants' appeal also relies heavily, and inappropriately, on NCTA's contested Statement of Material Facts. *See, e.g.*, J.S. 26-27.

1. *Appellants' "Compelled Speech" and "Editorial Discretion" Arguments For Strict Scrutiny Are Unfounded.*

No *per se* rule requires strict scrutiny whenever government may be said to be "mandating speech" or interfering with cable operators' so-called "editorial discretion."[25] Such a rule would yield absurd results.[26] All three judges below rejected that argument—*see Turner Broadcasting System, Inc. v. FCC*, 113 S. Ct. at 1807 (Rehnquist, C.J., in chambers)—and it is foreclosed by *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

In *PruneYard*, a private property owner raised a "compelled speech" and "editorial discretion" challenge to a

[25] The "editorial discretion" for which appellants claim protection is merely their desire not to carry local broadcast stations. *See* J.S. 17-18. Their "editorial discretion" claim is thus indistinguishable from their "compelled speech" claim.

[26] Appellants' *per se* argument would subject to strict scrutiny an enormous range of federal and state laws that compel speech, including the Act's requirement that cable operators carry the same "emergency information" broadcasters are required to carry, Section 16(b); citizens' obligation to testify truthfully pursuant to compulsory process (*see Branzburg v. Hayes*, 408 U.S. 665 (1972) (applying rational basis scrutiny to compulsory process)); the tax code's filing and disclosure requirements (26 U.S.C. §§ 6012, 6061); laws requiring disclosure of health statistics (*e.g.*, 42 U.S.C. § 242, 38 U.S.C. § 7332); all disclosure requirements involving publication of periodicals (39 U.S.C. § 3685); employment (*e.g.*, 26 C.F.R. §§ 31.6001-2(a), -4(a)(3)); medical informed consent, *e.g.*, *Marchione v. New York*, 598 N.Y.S.2d 592, 593 (3d Dep't 1993); *Mathis v. Morrissey*, 11 Cal. App. 4th 332, 13 Cal. Rptr. 2d 819, 822 (1992); *Febus v. Barot*, 260 N.J. Super. 322, 616 A.2d 933, 935 (3d Dist. 1992); cash deposits exceeding $10,000 (31 U.S.C. § 5311 *et seq.*); lobbying activity (2 U.S.C. §§ 261-270)—and indeed *every* governmentally compelled disclosure requirement. Under the *per se* rule appellants urge, strict scrutiny would govern challenges to the "common carrier" obligation of telephone and telegraph companies to carry any speaker wishing to use those services. 47 U.S.C. § 201(a) (wire and radio services); 47 U.S.C. § 11 (telegraph operators). Of course, that is not the law.

law authorizing third parties to use the owner's property to communicate their messages. For reasons directly applicable here, the Court held that the First Amendment was not even *implicated* by the claim. There, as here, "no specific message" was "dictated by" the government, and the obligation to permit third party speech was not "trigger[ed] by the owner's speech." 447 U.S. at 87-88. Thus, there was "no danger of governmental discrimination for or against a *particular message*," and no danger that requiring the owner to permit third party speech would "deter" the owner from speaking. *Id.* (emphasis added). Furthermore, in *PruneYard*, as here, "the views [of the third parties] will not likely be identified with those of the owner," and the owner could "expressly disavow any connection with the message." *Id.* at 87. For these reasons, *PruneYard* held that the owner's "negative free speech" rights under the First Amendment were not even *implicated*, and the Court upheld that law under the rational basis test. Nor do appellants' "negative free speech" claims implicate the First Amendment here, much less trigger strict scrutiny.[27]

In contrast to *PruneYard*, the First Amendment *was* implicated by the mandatory disclosure requirement at issue in *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), because that requirement was triggered by and deterred underlying protected speech *of particular content*—charitable solicitations by professional fundraisers. The *Riley* majority noted that "the desired and intended effect of the statute" was to "discourage" certain protected solicitations—those the State considered misleading or harmful. *Id.* at 789 n.5, 790. Similarly, the right-of-reply statute at issue in *Miami Herald Pub.*

[27] In *PruneYard*, the property owner specifically argued, as do appellants here, that *Wooley v. Maynard* and *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974), established an absolute *per se* right to deny other speakers access to private property to facilitate their speech. Brief For Appellant in No. 79-289, *PruneYard Shopping Center v. Robins*, at 13-14. This Court squarely rejected that overly expansive interpretation. 447 U.S. at 87-88.

Co. v. Tornillo, 418 U.S. 241 (1974), implicated the First Amendment because it was triggered by speech *of particular content*—criticism of candidates for public office—and penalized and deterred such speech. *Id.* at 257; *see PruneYard*, 447 U.S. at 88 (distinguishing *Tornillo*).[28] Like the law at issue in *PruneYard*, Section 4 does not implicate the First Amendment because it does not deter speech of particular content.[29]

Moreover, even if Section 4 implicated the First Amendment—and it does not—neither *Riley* nor *Tornillo* would support the application of strict scrutiny here. *Riley* held at most that there is a constitutional "equivalence" between "compelled speech" and "compelled silence." *Id.* at 797. Compelled silence triggers strict scrutiny only when the purpose of the statute is related to the suppression of free expression. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (applying *O'Brien/Ward* to a law forbidding speech of specific content). Accordingly, *Riley* holds that a law

[28] The *Tornillo* and *Riley* statutes also dictated the content of the mandated speech—in *Tornillo*, the candidates' rebuttals of the newspapers' criticisms; in *Riley*, specific financial disclosures. As in *PruneYard*, Section 4 does not dictate the content of any speech.

[29] For these reasons, as in *PruneYard*, Section 4 will not " 'dampe[n] the vigor and limi[t] the variety of public debate.' " *PruneYard*, 447 U.S. at 88 (quoting and distinguishing *Tornillo*, 418 U.S. at 257); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 10 (1986) (plurality opn.); *id.* at 30 (Rehnquist, J., now C.J., dissenting). As the Court explained in *PruneYard*, it was this inescapable *deterrent* effect that the Court "found to be an 'intrusion into the function of editors.' " 447 U.S. at 88 (quoting *Tornillo*, 418 U.S. at 258). Similarly, the compelled speech at issue in *PG&E* was triggered by PG&E's expression of its own views, and thus "penalize[d] the expression of particular points of view." 475 U.S. at 9-10 (plurality opn.); *id.* at 30 (Rehnquist, J., now C.J., dissenting). The laws at issue in *Tornillo* and *PG&E* "discriminate[d] on the basis of the viewpoints of the selected speakers." *PG&E*, 475 U.S. at 12. The principles of *Tornillo* are not violated by an access provision, such as Section 4, that does not "condition[] access upon discrete instances of certain expression," and "bears no relationship" to the compelled speaker's "future conduct." *PG&E*, 475 U.S. at 31 (Rehnquist, J., now C.J., dissenting).

compelling speech, like one *forbidding* speech, is subject to strict scrutiny if its purpose is related to the suppression of free expression. *Accord Wooley v. Maynard*, 430 U.S. at 716-17 (applying *O'Brien* to a law compelling speech of specific content); *PruneYard*, 447 U.S. at 87-88 (applying rational basis test to a law compelling speech without regard to content).

Strict scrutiny was appropriately applied in *Riley* because the disclosure burden rested on *a governmental concern that the underlying solicitations might otherwise be unfair or unreasonable*—a purpose related to the suppression of free expression. *Id.* at 788-89, 798; *see id.* at 803 (Scalia, J., concurring). Similarly, the right-of-reply statute at issue in *Tornillo* was appropriately subject to strict scrutiny because it plainly was justified by reference to the content of the regulated expression. The stated goal of the statute was "to insure fairness and accuracy" in reporting about elections. *Id.* at 251. In contrast, Section 4, like the content-neutral compelled speech provision at issue in *PruneYard*, is justified *without* reference to content or suppressive intent, and the district court was plainly correct in ruling that Section 4 does not trigger strict scrutiny.[30]

[30] *Tornillo's* final paragraph, focusing on "the function of editors," 418 U.S. at 258, reflected a theory, in vogue briefly in the 1970s, that the First Amendment's Press Clause explicitly conferred upon the press special protections not afforded other speakers. *See* Potter Stewart, *"Or of the Press"*, 26 Hastings L. Rev. 631, 633 (1975); *see also* William J. Brennan, Jr., *Address*, 32 Rutgers L. Rev. 173, 176-77 (1979). The Court subsequently rejected this theory. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting) (citing cases); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795-802 (1978) (Burger, C.J., concurring).

Moreover, *Tornillo* in that paragraph expressly distinguished a "newspaper or magazine"—whose content is determined through "the exercise of editorial control" and "journalistic judgment," 418 U.S. at 258; *id.* at 259 (White, J., concurring)—from "a passive receptacle or *conduit* for news, comment, and advertising." *Id.* at 258 (majority opinion) (emphasis added). Because a cable operator functions principally as a "passive receptacle or conduit," *see infra* Point II, Section 4 does not implicate the type of editorial

2. *Appellants' "Favoritism" and "Discrimination" Arguments For Strict Scrutiny Are Unfounded.*

Appellants argue that Section 4 should be subjected to strict scrutiny because it favors speakers using broadcast technology over speakers using other technologies. *See* J.S. 19-20. That is not the law. In *Leathers v. Medlock*, 111 S. Ct. 1438 (1991), this Court applied the *rational basis* test to a law that, like Section 4, singled out cable operators for burdens and favored speakers using other technologies. The Court held that "differential taxation of speakers, even members of the press, *does not implicate* the First Amendment unless the tax is directed at, or presents the danger of suppressing, *particular ideas*." *Id.* at 1447 (emphasis added). The Court expressly *rejected* the argument that "intermedia and intramedia discrimination, even in the absence of any evidence of intent to suppress speech or of any effect on the expression of particular ideas, violates the First Amendment." *Id.* at 1445; *see id.* at 1443 ("differential taxation of First Amendment speakers is constitutionally suspect [only] when it threatens to suppress the expression of particular ideas or viewpoints"). *Leathers* also made clear that a differential *regulatory* burden on different categories of speakers "is insufficient by itself to raise First Amendment concerns." *Id.* at 1446.[31]

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discretion that *Tornillo* protected. Thus, even if *Tornillo*'s reliance on the Press Clause retained any validity, the special concerns identified in *Tornillo* are not at issue here.

[31] *Leathers* also forecloses appellants' suggestion that imposing must carry obligations on cable operators, but not on other media, triggers strict scrutiny. *See* J.S. 13-16. *Leathers* squarely ruled that cable operators are *not* a "small group" for purposes of First Amendment analysis, and that regulations singling out cable operators for special burdens do *not* trigger strict scrutiny. 111 S. Ct. at 1444-45. *See also FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096 (1993) (applying rational basis test to alleged discrimination against cable operators whose cables cross public rights of way).

Appellants' reliance on *Burson v. Freeman*, 112 S. Ct. 1846 (1992), is entirely misplaced. In *Burson*, this Court applied strict scrutiny to a *content-based* restriction on core political speech conducted in a quintessential public forum. *Id.* at 1850.

Buckley v. Valeo, 424 U.S. 1 (1976), is not to the contrary. *Buckley* itself made clear that absent the *ceilings* on expression and the speech-suppressive *objectives* of the expenditure and contribution limitations at issue there, legislative classifications that discriminate between *categories* of speakers, without more, do not even implicate the First Amendment. For that reason, *Buckley* applied *rational basis* scrutiny in upholding provisions that discriminated between major and minor parties in public election financing. 424 U.S. at 97-106. *Cf. PG&E*, 475 U.S. at 27-28 (Rehnquist, J., now C.J., dissenting) (relying on this aspect of *Buckley* in the context of an access requirement).

In another section of the opinion, *Buckley* applied strict scrutiny to the expenditure and contribution limitations at issue not because they treated different speakers differently, but because they were content-based *bans* that directly suppressed all speech conducted with expenditures and contributions in excess of $1,000 per person. The expenditure and contribution limitations imposed absolute ceilings on protected expressive activity, and thus "necessarily reduce[d] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Section 4 does *not* impose a limit on speech: to the contrary, it leaves cable operators free to carry as much speech as they wish, either on existing or expanded channel capacity. The *Buckley* Court expressly distinguished laws, like Section 4 (and the election financing provisions in *Buckley* itself), whose "presumed effect . . . is one of enhancing the volume and quality of coverage of public issues." *Id.* at 48, n.55 (internal quotation omitted).

Moreover, the *Buckley* Court stressed that Congress' *purpose*, in enacting the expenditure and contribution limitations, "involve[d] 'suppressing communication' "; Congress viewed the suppressed speech as "harmful" to the public interest. *Id.* at 17 (quoting *O'Brien*, 391 U.S. at 382). Because the limitations suppressed speech "out of concern for its likely communicative impact," *United*

States v. Eichman, 496 U.S. 310, 317 (1980), they were properly reviewed under strict scrutiny as a content-based ban.[32] In contrast, Section 4 is justified by factors wholly unrelated to the content of the speech of broadcasters or cable operators, and is not *intended* to suppress any speech. Accordingly, the "discrimination" about which appellants complain does not require strict scrutiny.

Buckley does not prevent Congress from protecting a discrete class of speakers from anticompetitive activities because Congress declined to extend identical protection to other classes of speakers who do not require identical protection. Indeed, the *Buckley* Court acknowledged that "sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." 424 U.S. at 97-98 (internal quotes omitted). So long as Congress does not "aim at the suppression of dangerous ideas," it is free to treat different classes of speakers differently, even though that may have the effect of enhancing the speech of some classes over the speech of others. *Regan v. Taxation With Representation*, 461 U.S. 540, 548, 550 (1983) (quotation omitted).[33]

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[32] As the district court held, "*Buckley* is thus a case in which the government sought, in effect, to suppress the expression of a meretricious idea. Speaker partiality alone, however, absent evidence that the government's distinction between groups of speakers is related to what the speakers are saying, is insufficient to trigger strict scrutiny." J.S. App. 18a. Appellant NCTA recently acknowledged that this understanding of *Buckley* is correct. Memorandum of Intervenor-Defendant National Cable Television Ass'n, Inc. in Opposition to Plaintiff's Motion for Summary Judgment and in Support of its Cross-Motion for Summary Judgment, in *Chesapeake and Potomac Telephone Co. v. United States*, No. 92-CV-1751-A (E.D. Va.), at 70-72 (citing and relying upon the opinion below on this point). Copies of that brief have been lodged with the Clerk of this Court.

[33] Here, Congress did extend substantial protections to cable programmers. *See* note 9, *supra*. Strict scrutiny applies only if the government cannot explain the differential treatment of broadcast programmers and cable programmers "by some special characteristic" of those speakers. *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983). Congress has explained why the special characteristics of local broadcast stations require different treatment for local broadcasters than for cable programmers: local broadcasters are the primary objects of cable operators' anti-competitive activities because they *alone* can compete with cable operators for local advertising revenues. Findings ¶¶ 14-16. Moreover, local broadcasters *alone* fulfill the needs of the 40% of the American public who either cannot or do not subscribe to cable television. *See id.* ¶ 12. Providing "identical" protection to cable programmers would do nothing to further that goal. For these reasons, under *Leathers*, Section 4's differential treatment of local broadcast stations and cable programmers does not require strict scrutiny.

D. The District Court Could Properly Have Upheld Section 4 Under the Rational Basis Test.

The district court correctly concluded that Section 4 fully satisfies the *O'Brien/Ward* test, but appellants' claims could also properly have been dismissed pursuant to the rational basis test. As noted in Point I.C., *supra*, appellants' "compelled speech" and "editorial discretion" claims are indistinguishable from claims rejected under the rational basis test in *PruneYard*, and appellants' "discrimination" and "singling out" claims are indistinguishable from claims rejected under the rational basis test in *Leathers*. Because Section 4 satisfies the more demanding *O'Brien/Ward* test, it plainly satisfies the rational basis test. *See generally FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096 (1993).

Moreover, Section 4 is directly analogous to economic laws of general applicability, such as the Sherman Act, adopted for purposes wholly unrelated to the suppression of expression. An antitrust injunction forbidding exclusionary practices by a cable monopolist would not be subjected to First Amendment scrutiny. *See Sunbelt Television, Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333, 335-36 (C.D. Cal. 1992). There is no reason to apply such scrutiny to Section 4, which was enacted to accomplish precisely the same unobjectionable and substantial goal. *See* J.S. App. 12a-13a; *Associated Press v. United States*, 326 U.S. 1 (1945).

II. THE JUDGMENT SHOULD BE SUMMARILY AFFIRMED FOR THE INDEPENDENT REASON THAT FACILITATING COMPETITION THROUGH THE MONOPOLIZED CABLE CONDUIT DOES NOT REQUIRE THE SAME FIRST AMENDMENT SCRUTINY AS REGULATION OF THE EDITORIAL DISCRETION OF THE TRADITIONAL PRESS.

As demonstrated, plenary review is unwarranted because the district court correctly rejected Appellants' claims on the basis of settled First Amendment principles. But even if there were some question about the correctness of the decision below under the standards applicable to the traditional press—and there is not—plenary review would nonetheless be unwarranted. Appellants' case depends on an assumption they have not even attempted to prove: that a cable operator's exercise of its bottleneck monopoly power to exclude competitors is entitled to the same level of First Amendment protection afforded to the editorial function of the traditional press. That proposition is untenable.

"Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). Indeed, "[e]ach method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981) (internal quotes omitted); *accord Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969); *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949). Accordingly, "the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring).

The "editorial discretion" of cable operators at issue here is not entitled to the same level of First Amendment

protection afforded the traditional press. *First*, unlike broadcasters or newspapers, cable operators are not principally engaged in the *generation* of news, information or entertainment programming. Rather, much like telephone companies, cable operators function principally as *conduits*; they "simultaneously receive and channel to their subscribers a variety of signals from many sources without any advance notice about the . . . content of" the programming provided. *Crisp*, 467 U.S. at 707. Performance of this conduit function involves "editorial discretion" only in the limited sense that cable operators choose an overall package of channel offerings designed to maximize the operator's profits.[34] As a leading cable lawyer has acknowledged, "important differences" between the ways cable operators and newspapers function "tend to make the decision [whether to carry a particular programmer] more like an economic activity and render the editorial aspects almost entirely theoretical." Daniel Brenner, Cable Television and the Freedom of Expression, 1988 Duke L.J. 329, 339 (1988).[35]

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[34] *See* J.S. 3-4 (cable operators seek "the most attractive package for consumers of news, information and entertainment").

[35] *See also* Brenner, 1988 Duke L.J. at 339 ("For the most part, cable personnel do not review any of the material provided by cable networks. . . . [C]able systems have no conscious control over program services provided by others. . . . [G]enerally [there is] no individual selection of programs or series, only of entire channels"); *id.* at 341 ("[i]n this capacity [cable] operates as a *conduit*") (emphasis added).

Cable technology also enables cable operators to *add* an unlimited number of programmers simply by using previously unused channels or increasing channel capacity. *See Quincy*, 768 F.2d at 1450 (cable's channel capacity is "virtually unlimited"). When Congress enacted Section 4, approximately 9,000 of the nation's 11,000 cable systems had unused channel capacity. *Compare Television and Cable Action Update*, Feb. 8, 1993, at 4 (over 11,000 cable systems), with Application For Injunction Pending Appeal in *Turner Broadcasting System, Inc. v. FCC*, No. A-798, at 17, n.22 ("about 2,000 cable systems . . . currently have no excess channel capacity"). Thus, Section 4 does not prevent cable operators from carrying any programming they wish.

Second, cable is not just one among several fungible local conduits for video programming; as Congress concluded, cable has become the *dominant* medium for providing video programming to consumers, and has largely supplanted competing delivery systems, such as over-the-air transmission, for 60% of American households. In 99% of communities, the cable operator is a monopoly. Cable operators decide which programmers will be transmitted through their conduits, and thus function as private censors in each community.

Third, cable operators have concrete economic incentives to harm local broadcasters, because cable operators compete directly with local broadcasters for advertising revenues. Profit maximization provides an ample incentive for cable operators to abuse their control of the conduit in order to deny local broadcasters the ability to reach the 60% of Americans who *do* have cable. Given local broadcasters' dependency on the cable conduit, such exclusionary conduct by cable operators inevitably harms consumers, reduces the diversity of programming sources, and debilitates or destroys the only source of video programming available to the 40% of Americans who do *not* have cable.

Fourth, cable operators occupy their dominant bottleneck position as a direct result of three decades of governmental assistance. Wide-ranging federal regulation has long sought to "assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all parts of the country." *Crisp*, 467 U.S. at 708.[26]

[26] For example, federal law precludes private and public entities that control facilities *cable* companies need for access to consumers from exploiting their position to deny or unreasonably charge for such access. In 1978, at the request of the cable industry, Congress authorized the FCC to regulate the rates, terms, and conditions that owners of utility poles could charge for access to their poles—access that was essential to the ability of cable operators to reach subscribers. *See* Pole Attachment Act of 1978, 47 U.S.C. § 224(b)(1). The 1984 Cable Act strengthens that protection and guarantees cable operators access to private easements dedicated by utilities. 47 U.S.C. § 541(a)(2). Federal law also prevents municipal franchising authorities from imposing unreasonable conditions on cable operators, and from exploiting their leverage during the franchise renewal process. 47 U.S.C. §§ 542(b), 544(b).

Federal law has also insulated the cable industry from potentially more powerful competitors. By 1970, the FCC had imposed cross-ownership rules that prohibited telephone companies and broadcasters from entering the cable market. 47 C.F.R. §§ 63.54(a), 76.501(a) (1970). The 1984 Cable Act codified the cross-ownership restrictions. 47 U.S.C. § 533(a), (b)(4). *But see* n.13 *supra*. And federal law grants cable operators compulsory and preferential access to *broadcast* programming by granting them a compulsory copyright license to retransmit broadcast programming either free or upon payment of nominal royalties. *See* Copyright Revision Act of 1976, 17 U.S.C. § 111. The FCC has concluded that, in the absence of must carry rules, the compulsory license scheme "forced the cable television industry and the broadcast television industry into a significantly imbalanced 'contract'," and contributed significantly to cable's "explosive" growth. 1990 FCC Cable Report, 5 FCC Rcd. at 5038 (¶ 147).

Cable operators thus occupy "a preferred position *conferred by the government.*" *See Red Lion*, 395 U.S. at 400 (emphasis added).

Fifth, in contrast to the hands-off approach historically taken with respect to newspapers and other print media, regulation of cable operators' conduit function has long been recognized as an important and appropriate exercise of governmental power. As the Court explained in *Crisp*, since the early 1960s the Commission has been:

> concerned that unlimited importation of distant broadcast signals into the service areas of local television broadcasting stations might, through competition, "destroy or seriously degrade the service offered by a local television broadcaster," and thereby cause a significant reduction in service to households not served by cable systems. *First Report and Order*, 38 F.C.C. 683, 700 (1965). In order to contain this potential effect, the Commission promulgated rules *requiring cable systems to carry the signals of all local stations in their areas*, to avoid duplication of the programs of local television stations carried on

> the system during the same day that such programs were broadcast by the local stations, and to limit their importation of distant broadcast signals into the service areas of the local television broadcasting stations. *Second Report and Order*, 2 F.C.C. 2d 725, 745-746, 781-82 (1966).

467 U.S. at 701-02 (emphasis added). Cable operators have thus been subject to must-carry rules for many years. *See, e.g., Cable Television Report and Order*, 36 F.C.C. 2d 325 (1972), *aff'd sub nom. American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975); *see also Cable Television Syndicated Program Exclusivity Rules Report and Order*, 79 F.C.C. 2d 663, 891 (1980), *aff'd sub nom. Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

Taken together, these five characteristics—the attenuated nature of cable operators' First Amendment "editorial discretion"; cable operators' unbridled power to determine what speech will be received by much of the community; cable operators' powerful anticompetitive incentive to prevent local broadcasters from reaching the large cable audience; government's pivotal role in conferring such dangerous powers on cable operators; and the long history of regulation of the cable conduit—warrant less than strict scrutiny for viewpoint-neutral regulation ensuring access to the cable conduit. Indeed, what cable operators describe as an exercise of "editorial discretion" is the very anticompetitive conduct that places at risk the availability of free television for the 40% of Americans without cable.[37] Thus, the assumption underlying appellants' entire argument—that regulation of the cable conduit requires the same First Amendment scrutiny as regulation of the traditional press—is unwarranted, and plenary review should not be granted because, even if the Court ultimately did not accept the district court's analysis, Section 4 would plainly be upheld under a First Amendment analysis appropriate to cable.

[37] *See Preferred Communications*, 476 U.S. at 495 ("where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests").

Appellants argue for strict scrutiny, hoping that under that standard their attenuated First Amendment interest in silencing other speakers in order to maximize their own revenues will render irrelevant all countervailing public interests, no matter how weighty or how numerous those other interests may be, and will trump even compelling public interests if they could conceivably be advanced in any less burdensome way. Appellants assert that they can constitutionally control the "mix" of video offerings in every American community, even if their "editorial discretion" is exercised for anticompetitive purposes, and degrades or destroys the local broadcast stations on which 40% of the population depends for news, information and entertainment.

The First Amendment does not require such a conclusion—a conclusion rejected even by Judge Williams in dissent below. The unanimous Court in *Associated Press v. United States* articulated the First Amendment principle that controls here:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . . *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.*

326 U.S. 1, 20 (1945) (emphasis added).

For these reasons, the First Amendment does not require strict scrutiny for Congress' efforts to ensure that cable operators set aside a limited portion of the cable conduit for use by local broadcasters. *See Preferred Communications*, 476 U.S. at 495. *See also FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 n.9 (1979) ("[a] cable system may operate as a common carrier with respect to

a portion of its service").[38] Because the "purpose and effect" of Section 4 "is to promote free speech, not to restrict it," and to remedy the dangers to free expression posed by cable's exercise of its bottleneck monopoly power to exclude competing voices, this provision is entirely consistent with the First Amendment. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 801 (1978).

CONCLUSION

The judgment of the three-judge district court should be summarily affirmed.

Respectfully submitted,

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[38] Indeed, because Congress could certainly have required any entity wishing to provide cable service to accept common carrier status, it can take the lesser step of requiring that a portion of the conduit be set aside for use by others.